
(2008) 10 PAT CK 0029
In the Patna High Court
Case No : CWJC No. 14937 of 2008

Jwala Prasad

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 22-10-2008

Acts Referred:

Departmental Examination Act — Section 22

Citation : (2009) 3 PLJR 547

Hon'ble Judges : Ajay Kr. Tripathi, J

Bench : Single Bench

Advocate : A. Amanullah and M.K. Pathak, Subodh Kumar Jha and Jitendra Kumar Pandey, for the Appellant; Rajiv Kumar Singh, for the Respondent

Final Decision : Dismissed

Judgement

Ajay Kr. Tripathi, J.—Petitioner is seeking quashing of the order dated 10.9.2004 contained in Annexure-9, by virtue of which petitioner's demand and claim to prepone his date of promotion on the post of Executive Engineer to 7.7.1982 instead of 10.2.2000 as according to him his eligibility for such a promotion had accrued in his favour from 7.7.1982 itself. Petitioner also desires promotion to the next higher post of Superintending Engineer which according to him will also accrue to him provided his demand for preponing the date of promotion is accepted. As per the petitioner's case he entered the service as a temporary appointee on the post of Assistant Engineer (Civil) on 1.7.1975. According to the petitioner, out of the four appointees to such post he figured at serial No. 1. Petitioner subsequently occupied the post on a substantive basis. According to him, since he belongs to the scheduled caste category, therefore, he is entitled to next higher promotion after completion of 7 years of service. As he joined the post of Assistant Engineer on 7.7.1975 the next promotion ought to accrue to him after 7 years as a matter of course and that would be 7.7.1982. Eligibility for promotion to the post of Superintending Engineer is to accrue after additional 8 years. Since the benefit of promotion did not accrue to the petitioner he moved

the High Court by filing CWJC No. 4302 of 2000. During the pendency of the writ application in terms of the order contained in Annexure-5 dated 22.12.2003 petitioner was granted promotion on the post of Executives Engineer with effect from 10.2.2000 but this did not satisfy the petitioner. He demanded by moving the respondents to shift his date of promotion to 7.7.1982. Another reason why the petitioner was aggrieved or irked was because some juniors to him had been granted promotion from an earlier date as would be evident from perusal of Annexure-5. Petitioner therefore pursued his matter with the respondents asserting his claim for not only shifting the date of promotion but also demanding promotion to the next higher post. Since the respondents did not oblige him for the reasons indicated in Annexure-9, which is the impugned order dated 10.9.2004, the present writ application came to be filed.

2. The reason for rejection of the claim of the petitioner for shifting the date of promotion as communicated by the Deputy Secretary, Department of Housing, Government of Bihar, was that the petitioner had not passed the departmental and/or professional examination in all these years of service which was a sine qua non before he was entitled to such a benefit. Petitioner has been granted promotion from the date he passed the professional examination which was 10.2.2000. Reliance has been placed by the respondents on two circulars of the Government and those circulars have been brought on record as Annexures-10 and 11 to the writ application. Annexure-11 dated 13.11.1998 states that no person would be confirmed on the post till he passes the departmental examination. This would be further required even for the purposes of promotion to the next post. The rule with regard to passing of professional examination is contained in Annexure-10. Clause 7 has relevance where the consequences of not passing the examination have been indicated which also includes stoppage of increments and raise in salary.

3. The earlier writ filed by the petitioner was not decided on the merits of the case because the petitioner decided to withdraw the same with liberty to challenge the impugned order contained in Annexure-9 which came to be passed during the pendency of the earlier writ application. This is how the present writ application is before this Court.

4. A counter affidavit has been filed on behalf of the respondent which is Housing Department, Government of Bihar. A separate counter affidavit has also been filed by the Housing Board where the petitioner is employed. In the counter affidavit filed on behalf of the State they have stated that the claim challenging Annexure-9 and demanding shifting of the date of promotion to 7.7.1982 was misplaced because the petitioner had not fulfilled all the criteria of promotion. The petitioner does not deny that he had not passed the professional examination which every Civil Engineer appointed on a substantive post was required to do. If the petitioner had not cleared the professional examination before the date or the time when his promotion came to be due then he cannot be extended the benefit of promotion as a matter of time by sheer passage of 7

years. As the petitioner passed the departmental examination, from 10.2.2000 he has been extended the benefit of promotion. This aspect is not even disputed by the petitioner. The stand of the State is that as per the PWD code it was mandatory for the petitioner to pass the professional examination within three years but then he has taken his own sweet time in this regard. The claim of the petitioner is not only misplaced but also unreasonable because he cannot be allowed advantage of his own failure to pass the examination. The opinion of the Personal and Administrative Department was also obtained in this regard and they were of decisive opinion that passing of the professional examination was a must before confirmation and promotion. There is no way the requirement can be waived for the petitioner. The claim of the petitioner was reexamined and a communication dated 15.2.2007 which is the decision of the Secretary of the Department of Housing has also been brought on record as Annexure-F to the counter affidavit.

5. Similar kind of stand has been taken in the counter affidavit filed by the Housing Board i.e. respondents 4 and 5. They state that in terms of Section 22 of the Departmental Examination Act read with relevant circulars in this regard brought on record, passing of the professional examination was a must for promotion. They also deny that anybody junior to the petitioner had been granted promotion over and above the petitioner. The promotion granted to the petitioner from the year 2000 was in consultation with Bihar Public Service Commission and even they did not find anything wrong with the decision taken in this regard by virtue of Annexure-5.

6. In the reply filed on behalf of the petitioner to the counter affidavit he reiterates his claim that he be granted promotion to the post of Executive Engineer from the year 1982 even though he had not passed the professional examination. According to him, there is no mandatory provision for passing the said professional examination. His further stand is that respondents have not bothered to invoke their option of either stopping the increments due to non-passing of the examination or delaying confirmation of the post. If the respondents have given a go-by or chose not to exercise the option in terms of the circulars the same cannot be held to be against the petitioner in matter of shifting of the date of promotion. The question therefore which requires consideration by the Court is whether the decision contained in Annexure-9 or the decision subsequently taken and communicated to the petitioner contained in Annexure-F dated 15.2.2007 filed by the State are in any manner arbitrary, illegal or based on misplaced reasons.

7. Reading of the circulars contained in Annexures-10 and 11 does indicate that after joining service on the post in question, a Government servant is required to pass certain departmental examination. This is a basic test of proficiency and efficiency which a Government servant is required to clear after rendering service for a couple of years. Annexure-11 does indicate that there is a kind of mandate to clear such examination. In this regard there are certain deterrents which have

been provided if Government servant decides not to pass the examination. Annexure-11 is a general circular and Annexure-10 deals with people who are appointed on the post of Engineers under the Bihar PWD Code because Annexure-10 deals with the issue of passing professional examination which is required for holders of the posts of Civil Engineering. A reading of Annexure-10 does surely impart a kind of mandate upon all such employees to pass the professional examination within three years. The authorities have been conferred power to withhold increments or such other deterrents to compel them to pass the examination in the early stages of appointment. Merely because there has been a kind of omission or may be oversight by the respondents to confirm the petitioner on the post and not withhold his increments over the number of years despite the petitioner not having passed the departmental examination then it does not confer right upon the petitioner to take his own time to pass professional examination and also claim benefit of promotion based on a time bound basis. Effort has been made by the counsel appearing on behalf of the petitioner that the circulars and requirements which have been made the basis for rejecting the claim of the petitioner both in the communication as contained in Annexure-9 and Annexure-F is misplaced because the above two provisions should be read to be directory and not mandatory. But the court has certain reservation in accepting that position. More so when it is the stand of the respondent-State that this is parameter which has been applied and are being applied for grant of promotion to employees.

8. Learned counsel for the petitioner thereafter by way of supplementary affidavit has tried to show that a similarly situated person Dev Sunder Paswan has been granted benefit of promotion from a date even prior to passing of the departmental/ professional examination. This, according to him, is a clear case of discrimination and the petitioner therefore should be treated in a similar manner.

9. Learned counsel appearing for the respondents, however, have taken stand that the case of Dev Sunder Paswan cannot be made touchstone for decision making. If a mistake has crept into some decision then the same cannot be used as an example and allow waiver and requirements of the rules/circulars. The stand of the respondents is that two wrongs do not make a right. They have also stated that the case of Dev Sunder Paswan may require a re-look.

10. In view of the above decisions taken by the respondents to grant promotion to the petitioner from the date of passing of professional examination is not arbitrary or unreasonable.

11. Petitioner has not made out a case for interference with the impugned order or the subsequent decision communicated to him in this regard. The writ application is dismissed.